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Samuel J. Chilk
Secretary, U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

ATTN: Docketing and Services Branch

**Re: Radiological Criteria for the Decommissioning of
NRC-Licensed Facilities; Enhanced Participatory
Rulemaking, Availability of Draft Proposed Rule
59 Fed. Reg. 4868 (February 2, 1994)**

Dear Mr. Chilk:

On February 2, 1994, the Nuclear Regulatory Commission ("NRC") published in the Federal Register a notice of availability of, and opportunity to comment on, a draft proposed rulemaking, as part of the NRC's "enhanced participatory rulemaking" to codify uniform radiological criteria for the decommissioning of NRC-licensed facilities. 59 Fed. Reg. 4868 (1994).

On behalf of the Utility Decommissioning Group ("Group"),^{1/} we submit the following comments on the draft proposed rulemaking.^{2/} Additional Group comments on specific provisions of the draft rule and accompanying discussion ("Draft Rule Paper") are enumerated in an Attachment.

^{1/} The members of the Utility Decommissioning Group are Duke Power Company; Florida Power and Light Company; Northeast Utilities; Texas Utilities Electric Company; and Virginia Electric and Power Company. Each Group member company owns or operates one or more nuclear power plants subject to NRC regulation.

^{2/} On June 28, 1993, the Group submitted comments on the Rulemaking Issues Paper prepared by the NRC Staff in support of this "enhanced participatory rulemaking." In addition, on September 20, 1993, the Group submitted comments on the proper scope of the Generic Environmental Impact Statement ("GEIS") to be prepared in connection with this rulemaking.

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Comments on the Draft Proposed Rulemaking

The Group concurs with the NRC's belief that uniform radiological criteria for decommissioning will promote protection of the public health and safety; result in more efficient use of NRC and licensee resources; lead to more consistent application of decommissioning standards; provide a more stable basis for decommissioning planning; and expedite decommissioning activities. The Group supports the NRC's acknowledgement of the "need for flexibility in applying these criteria" (Draft Rule Paper at 27) and particularly the need to preserve licensees' flexibility in selecting the most appropriate methodologies for meeting the decommissioning criteria (Draft Rule Paper at 31).

The Group also supports the NRC's efforts to date in coordinating with the Environmental Protection Agency on the "enhanced participatory rulemaking." The Group encourages the NRC to continue to seek such cooperation, to ensure that, in meeting the standards ultimately adopted by NRC, licensees will also be able to satisfy the expectations of EPA, in its capacity as successor to the Federal Radiation Council in accordance with Reorganization Plan No. 2 of 1970.^{2/}

The Group commends the NRC for incorporating these considerations into its "enhanced participatory rulemaking" and for its efforts to reflect many disparate viewpoints in proposing uniform standards for decommissioning. In support of this effort, the Group proposes that the following revisions or clarifications be considered in connection with the development of the proposed rulemaking:

1. **The Provisions Of The Draft Rule Concerning NRC Notification Of Licensee Intent To Undertake Restricted-Use Decommissioning And Formation Of A Site-Specific Advisory Board, If Adopted, Should Be Made Consistent With Existing Regulations Governing Submission Of A Proposed Decommissioning Plan.**

The draft rulemaking would require licensees, as part of their notification to NRC of intent to decommission (as required by 10 C.F.R. § 50.82(a), for example), to specify whether they intend to undertake restricted-use decommissioning. Proposed Section 20.1407(e); Draft Rule Paper at 76. (Presumably, this is the

^{2/} The Group does not address in its comments the appropriate levels or form (e.g., limit or goal) for residual radioactivity criteria for decommissioning, but rather defers on these issues to the comments submitted by the Nuclear Management and Resources Council.

"proposal . . . for restricted release" referred to in Proposed Section 20.1406(a).) At the same time, the rule would require, where restricted-use decommissioning is undertaken, that the licensee's Decommissioning Plan "include the recommendations of the [Site Specific Advisory Board ("SSAB")] and the licensee's proposed analysis and disposition of this advice." Proposed Section 20.1407(b); Draft Rule Paper at 75.

These provisions are incompatible with existing regulations governing submission of proposed Decommissioning Plans (e.g., 10 C.F.R. §§ 30.35, 50.82, 70.38, and 72.54). Section 50.82(a), for example, provides that "[e]ach application for termination of license must be accompanied, or preceded, by a proposed decommissioning plan." 10 C.F.R. § 50.82(a) (emphasis added). Clearly, it would not be possible to provide the recommendations of the SSAB at the time of notification of intent to decommission, as would be necessary if those recommendations were to be included in the proposed Decommissioning Plan accompanying the notification.

In comments below, the Group suggests that the NRC reconsider the appropriateness of requiring SSABs. Should the NRC nevertheless determine to adopt the SSAB approach, these inconsistencies in requirements for the timing of submission of decommissioning information to NRC would need to be addressed. The Group would suggest that SSAB recommendations not be required to be submitted to NRC until six months after an application for termination of license is submitted. This would allow licensees sufficient time, after providing notice of intent to terminate the license, to establish and obtain recommendations from an SSAB and forward the results to NRC in time to be considered in connection with review of the licensee's Decommissioning Plan.

2. The NRC Should Clarify The Standard For Revisiting The Sufficiency Of Decommissioning At A Particular Site After License Termination.

As the NRC recognizes in the draft rulemaking paper, "it is important to provide a high level of assurance that decommissioning actions conducted under the current criteria will not need to be revisited in the future under potentially more restrictive criteria." Draft Rule Paper at 22. However, the provision in the proposed rule governing finality of license terminations does not provide an objective, quantifiable standard for revisiting the sufficiency of decommissioning. With respect to finality of license termination, the draft proposed rule states:

Once a site has been decommissioned and the license terminated . . . the Commission would require additional cleanup only if, based on new information, it determines that residual

radioactivity remaining at the site could result in significant public or environmental harm.

Draft Rule at 70 (Proposed Section 20.1401(c)) (emphasis added).

The discussion accompanying the draft proposed rulemaking provides no clarification of this provision and, in fact, creates the potential for confusion regarding its application. The Draft Rule Paper notes the above proposed rule provision and then states:

Therefore, once a site has been decommissioned and the license terminated in accordance with the criteria in the rule, the Commission will require additional cleanup only if, based on new information, it determines the level of residual radioactivity at the site substantially violates these criteria.

Draft Rule Paper at 22.

The proposed rule provision and above-quoted statement suggest two distinct and potentially inconsistent standards for reopening decommissioning -- one based on NRC judgment regarding the potential for "significant public or environmental harm" and the other based on an NRC finding that conditions at the site "substantially violate" the then-existing criteria. The use of the word "therefore" in the above statement suggests that the NRC views the two standards as equivalent. However, they appear divergent, and the draft proposed rule contains the language of the first standard only.

To ensure predictability and finality in decommissioning, the Group suggests that the proposed rule (Section 20.1401(c)) be revised to provide expressly that, barring evidence of mistake or fraud in connection with license termination, the Commission will require additional cleanup at a decommissioned site only if, based on new information, it determines that the level of residual radioactivity at the site substantially violates the NRC-approved regulatory criteria under which it was decommissioned. If the NRC seeks to preserve the possibility that new information could reveal the need to apply more stringent radiological criteria in the future, it could recognize a limited exception to this standard for instances in which reopening is determined to be necessary to prevent actual or imminent irreparable harm to public health and safety or the environment. To further ensure fairness and predictability with respect to the reopening of decommissioning, any such determination should be made only in a non-discriminatory manner (for example, through generic rulemaking to adopt new radiological criteria).

3. The NRC Should Reconsider The Appropriateness Of Its Proposal To Create Site-Specific Advisory Boards In Connection With Restricted-Use Decommissioning.

While the NRC understandably seeks to encourage public awareness and acceptance of the decommissioning process and site-specific decommissioning activities, it is not clear that an NRC-mandated SSAB is the appropriate means of facilitating those objectives. The Group encourages the NRC to reconsider the appropriateness of this aspect of the draft proposed rule, for several reasons.

First, it does not seem appropriate for the NRC to require public participation in the decommissioning process, as the draft proposed rule would. As currently proposed, the rule would require a licensee pursuing restricted-use decommissioning to constitute an SSAB and to recruit specified types of persons and entities to participate (to the extent they are "willing" to do so, regardless of whether they seek to do so) and would require those persons and entities to provide advice on specific issues such as the adequacy of institutional controls and the sufficiency of the licensee's showing of financial assurance. As an alternative approach, the NRC could hold local meetings and invite public participation as deemed appropriate. As another alternative, the NRC could require generally that licensees seek input from local interested parties and apprise the NRC of those activities, while leaving it to the licensee to determine the means of satisfying that requirement.

Second, the SSAB is proposed in a way which could limit the ability of licensee management to effectively and thoroughly implement its decommissioning plans. The Draft Rule Paper conveys the NRC's view that it is important for the public to be able to effectively participate in site decommissioning decisions. The proposed rule would require an SSAB to advise the licensee on the adequacy of institutional controls (largely a legal matter), the sufficiency of financial assurance measures (likely a detailed financial matter), and to recommend ways of reducing residual radioactivity (a matter that the NRC recognizes is best left to the licensee (Draft Rule Paper at 31)). Moreover, according to the proposed rule, a licensee would be required to reflect the recommendations of the SSAB in its Decommissioning Plan (Proposed Section 20.1407(b)). While it is certainly conceivable that an SSAB could provide valuable input on these subjects, a licensee should not be required to solicit such input or be forced to formally address each recommendation in its regulatory submittals. Such an undefined process can be expected to require the devotion of considerable licensee resources that could be better spent on effective and thorough decommissioning in accordance with NRC regulations. In most cases, decisions involving these technical, financial, and institutional control issues will be highly complex

matters that are best left to the licensee, in the first instance, and to the regulator. Moreover, requiring licensees to subject themselves to the recommendations of third parties may be inconsistent with state law regarding management of corporations and may even raise constitutional questions.

Third, the legal and regulatory framework for decommissioning already provides ample opportunity for public participation, through carefully conceived processes and forums that balance the need for public input and licensee flexibility to achieve regulatory compliance. The Administrative Procedure Act provides for public participation in the rulemaking process. In this case, the NRC, through the "enhanced participatory" process, has appropriately expanded considerably upon the required level of public participation in the development of the regulatory framework for decommissioning. With respect to participation in individual proceedings, the Atomic Energy Act contains specific provisions governing the intervention and hearing rights of persons affected by NRC-licensed activities. These statutory provisions were carefully fashioned to balance the interests of all parties involved and should not be expanded or constrained capriciously.

The proposed SSAB requirement is tantamount to another procedural layer, albeit without the formal process provided in 10 C.F.R. Part 2, in addition to the formal hearing opportunity already afforded. Licensees thus face the prospect of dual "public participation" processes. Such a framework could impose substantial unwarranted burdens on licensees and significantly upset the careful balancing of interests that the current regulatory framework for public participation seeks to preserve.

4. **Should The NRC Adopt The SSAB Concept, It Should Reconsider Several Aspects Of Its Proposal.**
 - a. **The NRC Should Make Clear That The SSAB Is An Advisory, Rather Than A Decision-making, Body, And That SSAB Expenses Are Not The Obligation Of The Licensee.**

The Group agrees with the NRC that it is important for the public to be fully informed of decommissioning actions and to have an opportunity to provide input on decommissioning-related actions. The Group is concerned, however, that the proposed role of the SSAB is too broadly defined, with the resultant possibility of impeding effective licensee management decision-making.

The draft rulemaking paper expresses the Commission's view that "it is important for the public . . . to be able to effectively participate in site decommissioning decisions." Draft Rule Paper at 24. This statement is followed by a discussion of

various means of public involvement in decommissioning, including the formation of SSABs for restricted-use decommissioning.

We are not aware of any precedent in NRC regulation for a requirement that a licensee establish an external advisory or decision-making body. If the NRC determines that this aspect of the rulemaking is appropriate and within its authority, the Group encourages the NRC to clearly define the SSAB as an advisory board, to be consulted for recommendations concerning decommissioning, but not as an active participant in decommissioning decision-making, a management prerogative that should not be reassigned by the regulator. Further, the NRC should define the SSAB process as one not intended to impose additional financial burdens on licensees. Thus, non-licensee participants would be expected to serve on a voluntary basis, without licensee recompense.

b. Several Of The Draft Rule Provisions Governing The SSAB Are Inappropriate For Inclusion In Regulations And Should Be Removed To Regulatory Guidance Or The Statement Of Considerations Accompanying The Rule.

The provisions in Proposed Section 20.1407(a) identify subjects on which the SSAB would be required to advise a licensee pursuing restricted-use decommissioning. It seems inappropriate to list these areas in the regulation as items that the SSAB "should provide advice" on, since any requirement to do so would not likely be enforceable, and since the listing presumably is neither applicable to all cases nor exhaustive. It is not possible to predict whether affected persons will desire to participate in such an activity and whether a particular SSAB will be qualified to advise on the legal, financial, and technical issues specified in the proposed regulation.

Similarly, the provisions in Proposed Section 20.1407(c) and (d), which describe the appropriate makeup of an SSAB, would be better suited to regulatory guidance. In particular, the specification in Proposed Section 20.1407(d) that the SSAB should consist of approximately 10 members seems unnecessary, and perhaps inappropriate, since the size of the board should be controlled by the number of participants needed to satisfy the diversity considerations in Proposed Section 20.1407(c).

As noted above, a better approach would be to identify these potential areas of consultation in the rule, omit the requirement for SSABs, and leave it to licensees to obtain input through new or existing community relations programs and apprise the NRC of those interactions.

5. **The NRC Should Explain More Clearly How A Licensee Will Demonstrate ALARA And How The NRC Will Approve That Showing.**

The draft proposed rule would appear to require that licensees, when determining ALARA for decommissioning, consider all significant radiological and non-radiological risks resulting from residual radioactivity and from the decommissioning process itself (including transportation and offsite disposal of radioactive waste). Proposed Section 20.1403(b). The Group supports this concept of considering all aspects of decommissioning in determining ALARA. However, the Group suggests that the NRC clarify the differences between ALARA as it has been applied in the Part 50, Appendix I, and Part 20 contexts to date and as it is used in the draft proposed rule. The Group further suggests that the NRC expressly recognize that licensees may be able to utilize analyses in the GEIS or other existing environmental analyses (e.g., in quantifying impacts of offsite LLW disposal or transportation) and would not be expected to duplicate such studies for purposes of demonstrating ALARA.

The Group is also concerned that ALARA could be misapplied in this context to impose unduly restrictive decommissioning criteria in individual decommissioning proceedings, i.e., that the use of ALARA creates the possibility for a "moving target" based on disagreement as to the sufficiency of decommissioning efforts undertaken at a particular site. Group members are concerned that substantial resources could be required to demonstrate and defend their ALARA efforts, before the NRC and to the public, in connection with decommissioning and license termination. To minimize the potential for abuse of or confusion or disagreement regarding application of decommissioning-related ALARA principles, the Group exhorts the NRC to develop detailed guidance on the considerations involved and the showings necessary for compliance. In particular, the NRC should explain whether the ALARA considerations for restricted-use decommissioning (viz: whether further remediation is technically achievable, prohibitively expensive, or likely to result in net harm) are also applicable to unrestricted-use decommissioning. The regulatory guidance should provide objective measures of these factors. In addition, the rule should make clear that the NRC, and not the SSAB, will be the ultimate arbiter on the adequacy of the licensee's ALARA efforts.

6. **The "Concepts" Contained In Section 20.1402 Of The Draft Proposed Rule Should Be Removed To Regulatory Guidance.**

Proposed Section 20.1402 restates the principal "concepts" embraced by this rulemaking -- a dose goal ("back to background") that is deemed met if a goal of 3 mrem TEDE/year is met and an upper-bound dose limit (15 mrem TEDE/year plus ALARA).

While these "concepts" are helpful, they do not constitute enforceable requirements. The proposed rule therefore should explicitly state that this section is intended not to create enforceable requirements but rather to provide context for the other provisions of the rule.

7. The NRC Should Consider How Any New Criteria Will Be Applied To Licensees At Various Stages Of Operation/Decommissioning.

The draft proposed rule provides that any new radiological criteria "would not apply to sites already covered by a decommissioning plan approved by the Commission before [the effective date of the rule]." Draft Rule Paper at 70; Proposed Section 20.1401(b). As noted in comments submitted by the Group on the Rulemaking Issues Paper prepared in connection with this rulemaking, under this approach (i.e., using possession of a Commission-approved Decommissioning Plan as the "cut-off" for determining applicability of any new criteria), a final rule on radiological criteria could have somewhat arbitrary and burdensome effects on licensees already embarked on or about to begin the decommissioning process. For example, a licensee that had submitted a proposed Decommissioning Plan eleven months prior to promulgation of the final radiological criteria rule, and was only days away from receiving approval of its Plan, could be subject to different criteria than a licensee whose Decommissioning Plan was approved just prior to promulgation of the new criteria. If the new criteria differed in any significant respect from those used in making assumptions in development of the Decommissioning Plan (and in funding the anticipated costs of decommissioning), a licensee awaiting approval of its proposed Decommissioning Plan could bear a greater burden in terms of cost and delay in revising that proposed Plan to reflect, among other things, changes in decommissioning methods, costs, and scheduling as a result of the new radiological criteria.

The radiological criteria with which a licensee must comply should not be determined by the length of time taken for NRC review of a proposed Decommissioning Plan, a process largely beyond the control of the licensee. A better approach, from the standpoint of predictability and incentive to licensees to expedite the decommissioning process, would be to apply existing criteria to licensees who have a proposed Decommissioning Plan submitted for NRC review at the time the new criteria become effective (see, e.g., 10 C.F.R. §§ 50.34(a)(5), (a)(11), (b)(6)(vii); 50.55a(b)(2)(iv)(B), (d)(1), (e)(1) (applicable to power plants whose application for a construction permit was docketed prior to a certain date)). In addition, any new criteria should be promulgated with an effective date that is sufficiently beyond the date of publication of the final rule (e.g., 18 months or two years from the date of publication) so that licensees who are then in the

process of completing proposed Decommissioning Plans can finalize those proposed Plans and submit them for review, without becoming subject to new criteria which might necessitate substantial reworking of the Plan.

8. The NRC Should Clarify Several Aspects Of Its Proposal For Restricted-Use Decommissioning.

a. The Proposed Provisions Governing Financial Assurance For Restricted-Use Decommissioning Are Unnecessary.

The NRC should reconsider the need to require a showing of financial assurance in connection with restricted-use decommissioning. The only unique factor associated with restricted-use decommissioning -- establishment of institutional controls -- should be largely accomplished at the time of decommissioning and, for most forms of control should require little additional funding. Deed restrictions and zoning controls, for example, would not be expected to require significant continued funding by a former licensee. In addition, while the proposed regulation would require that the licensee provide for institutional controls and be ultimately responsible for their maintenance, it is not certain that the burden of maintaining those controls would fall on the former licensee in every case. Flexibility to assign responsibility for "day-to-day" maintenance of institutional controls (including associated expenditures) should be left to the former licensee.

b. If Financial Assurance Provisions Are Adopted, A Time Period For Providing Institutional Controls and Financial Assurance Should Be Established.

The proposed rule should allow for a time limit on the requirement that a licensee provide institutional controls for restricted-use decommissioning. The proposed rule should recognize that such measures may not be necessary indefinitely and should contain a mechanism for obtaining approval for their elimination.

Similarly, the proposed rule or guidance should establish a timeframe for the financial assurance required of licensees electing restricted-use decommissioning. The NRC should also consider whether guidance on minimum funding amounts is necessary.

9. Proposed Section 20.1408(c) Concerning Minimization of Contamination and Waste During Plant Operation Is Unnecessary.

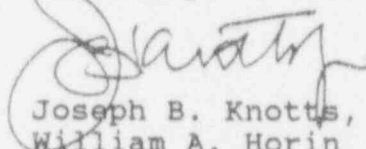
Group members suggest that Proposed Section 20.1408(c), which would require licensees to modify their radiation protection programs to "minimize contamination of the facility or the

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environment, facilitate eventual decommissioning, and minimize generation o[f] radioactive waste," is duplicative and unnecessary. The provision would be largely duplicative of existing ALARA programs which already promote minimization of contamination. In addition, power reactor licensees already have economic incentives (including the high cost and limited [at best] availability of low-level waste disposal) to maximize waste reduction efforts and minimize waste volumes and contamination. While the goals of contamination minimization and radwaste reduction are important ones, they are already being actively pursued by licensees and need not be incorporated in this rulemaking.

We appreciate the opportunity to comment on these matters of importance to the decommissioning process. We look forward to discussing these matters further as this rulemaking process continues.

Sincerely,



Joseph B. Knotts, Jr.
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Counsel to the
Utility Decommissioning Group

Attachment

Additional Comments of the Utility Decommissioning Group
on the NRC's Draft Proposed Rulemaking on Radiological Criteria

- The NRC should clarify the scope of activities considered part of decommissioning.

The draft proposed rulemaking paper states that "[d]ecommissioning activities are initiated when a licensee decides to terminate licensed activities." Draft Rule Paper at 6. This statement does not appear to accurately reflect the NRC's current definition of decommissioning, which includes pre-shutdown planning activities. See, e.g., Draft NUREG/CR-5884, Vol. 1, at 1.3 (first stage of decommissioning involves "pre-shutdown planning/engineering and regulatory reviews"). The draft rulemaking paper should be revised to acknowledge that certain decommissioning activities may be undertaken before a decision is made to terminate licensed activities.

- Should the NRC adopt the SSAB concept, it should establish the duration, and provide for the eventual dissolution, of an SSAB.

According to the Draft Rule Paper, it is expected that the work of the SSAB would be completed once its advice was provided to the licensee, and in any event, it is anticipated that the SSAB would be dissolved once the license has been terminated. The NRC should make clear the role, if any, that it contemplates for an SSAB between the time of development of a Decommissioning Plan and termination of license (i.e., during implementation of decommissioning). In addition, the rule should be revised to provide expressly for the dissolution of the SSAB at the appropriate stage of decommissioning (e.g., after submission of the proposed Decommissioning Plan or upon license termination).

- The NRC should specifically identify areas in which it has knowingly "extended its authority" to address non-radiological hazards.

The draft rulemaking paper notes that the NRC's authority is "limited by law primarily to ensuring protection of the public health and safety from radiological and nuclear hazards." Draft Rule Paper at 15. The paper also states that the NRC "has refrained from extending its reach to address non-radiological hazards except where . . . these hazards would not otherwise be adequately controlled because of a regulatory void." Id. The NRC should identify the areas in which it has extended its authority in this manner, so that the public can assess whether the NRC's justification (to fill a "regulatory void") is appropriate or its action statutorily authorized.

- The NRC should emphasize in the discussion accompanying the rule that the principal objective of public participation is to enhance public health and safety.

In the draft rulemaking paper, the NRC states that public involvement in this rulemaking and participation on SSABs "is expected to aid in the conduct of a decommissioning program that is understandable, technologically sound, and responsive to the concerns of affected parties." Draft Rule Paper at 16. While these considerations may be important, the principal objective of the decommissioning process should not be to make the process more understandable or to respond to all public concerns, but rather to effect decommissioning efficiently and effectively in accordance with regulatory standards. The NRC should make clear that, with respect to expenditure of decommissioning funds, assuring the protection of public health and safety takes priority over public education and response to general public concerns.

- The proposed definition of "background radiation" should be revised.

The draft proposed rule would revise the definition of background radiation to include "global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents like Chernobyl which contribute to background radiation and are not under the control of the licensee." Draft Rule Paper at 68; Proposed Section 20.1003. The Group suggests that the definition be revised to read simply: "global fallout from the testing of nuclear explosive devices or from past nuclear accidents."

- The NRC should clarify its statement regarding "unnecessary decommissioning activities."

On page 31 of the draft rulemaking paper, it is stated that "[t]he Commission has no authority over expenditure of funds that might be saved by avoiding what were termed "unnecessary decommissioning funds." The NRC should explain the meaning and purpose of this statement.

- If Section 20.1407 is retained in the proposed rule, subsection (a)(2)(c) should be revised to read "will not impose undue burden . . ." and subsection (b) should be revised to read "10 CFR Sections"
- Section 20.1401(c) should be revised to reference the specific sections of the final rule rather than "this proposed rule."